

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 31 XXX/
Number 4

Article 2

2021

The Sharing Economy & The Platform Operator-User-Provider “PUP Model”: Analytical Legal Frameworks

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Recommended Citation

Juan Jose Diaz-Granados and Benedict Sheehy, *The Sharing Economy & The Platform Operator-User-Provider “PUP Model”: Analytical Legal Frameworks*, 31 Fordham Intell. Prop. Media & Ent. L.J. 997 (2021).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol31/iss4/2>

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Cover Page Footnote

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The Sharing Economy & The Platform Operator-User-Provider “PUP Model”: Analytical Legal Frameworks

Juan Diaz-Granados* and Benedict Sheehy**

The Sharing Economy and related platform technologies have disrupted work, consumption, and business in ways unimaginable even a decade ago. Creating great wealth and opportunity for some, the Sharing Economy has equally undermined job security and safety for many others. One challenge for regulators, legal advisors, and scholars is developing a rigorous analytical model for these related phenomena. We present the first comprehensive legal framework for distinguishing and analyzing the various components of the Sharing Economy and their interrelationships. Our analysis is based on contract law and property law, providing a delimitation within the Sharing Economy and platform technologies based on legal categories. Our approach provides a foundation for analytical rigor that has been absent to date.

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Both of the authors extend their thanks to Nikita Harrison and the Fordham IPLJ's editorial team for their helpful suggestions and insightful comments.

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INTRODUCTION

The Sharing Economy is one of the most important social, economic, and legal phenomena in the world today. Yet there is no generally accepted definition of this phenomenon. A variety of terms are used to describe it, including the "Sharing Economy," "Crowd-Based Capitalism," "Collaborative Consumption," "Gig Economy," and "The Mesh."¹ It represents a new type of behavior and practice

¹ "Sharing Economy" is the most accepted term to denominate this phenomenon. See Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS. 107, 107 n.1 (2018) (providing empirical evidence about why the term "Sharing Economy" has been the dominant term used to describe the phenomenon); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 526 n. 85 (2016) (arguing that "the term 'sharing economy' appears to be the de facto term being used by regulators and policymakers, as well as the media and the companies themselves."); Chris J. Martin, *The Sharing Economy: A Pathway to Sustainability or a Nightmarish Form of Neoliberal Capitalism?*, 121 ECOLOGICAL ECON. 149, 151 (2016) (concluding that the Sharing Economy has become the predominant concept). However, other terms have been proposed, such as: (1) Collaborative Consumption, e.g., RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION (2010); (2) Collaborative Economy, e.g., Resolution on a European Agenda for the Collaborative Economy, EUR. PARL. DOC. (COM P8_TA(2017)0271) (2017); (3) Crowd-Based Capitalism, e.g., ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM (2016); (4) the Mesh, e.g., LISA GANSKY, THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING (2010); (5) Peer-to-Peer Market, e.g., Liran Einav et al., *Peer-to-Peer Markets*, 8 ANN. REV. ECON. 615 (2016); (6)

that is rapidly spreading and massively disrupting established business practices, business models, and regulatory frameworks around the globe.² At a most basic level, the Sharing Economy is facilitated by a new technology where one party provides goods and services (“Provider”) to another party (“User”) using an online platform operated by a third party (“Platform Operator”).³ This new technology creates many innovation opportunities for new business models as well as a new set of legal relations, a new legal structure or model. In this Article, this new legal structure or model is referred to as the ‘PUP model’ (Platform operator-User-Provider model).

Prior scholarship has conflated several distinct phenomena—lumping together different economies with technologies and

Peer-to-Peer Economy or P2P Economy, e.g., Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENV'T L. & LITIG. 1, 5 (2012); (7) Peer-to-Peer Consumption, e.g., Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 991 (2016); (8) Disaggregation Economy, e.g., Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2015); (9) Access-Based Consumption, e.g., Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 881 (2012); (10) Gig Economy, e.g., Valerio De Stefano, *The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy*, 37 COMP. LAB. L. & POL'Y J. 471 (2016); (11) Platform Economy, e.g., Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016); (12) On-Demand Economy, e.g., Daniel G. Cockayne, *Sharing and Neoliberal Discourse: The Economic Function of Sharing in the Digital On-Demand Economy*, 77 GEOFORUM 73 (2016); (13) 1099 Economy, e.g., Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1010 n. 2 (2017); (14) UBERnomics, e.g., Michael Motala, *The “Taxi Cab Problem” Revisited: Law and UBERnomics in the Sharing Economy*, 31 BANKING & FIN. L. REV. 467 (2016); (15) Bit Economy, e.g., Larry A. DiMatteo, *Regulation of Share Economy: A Consistently Changing Environment*, in DIGITAL REVOLUTION: CHALLENGES FOR CONTRACT LAW IN PRACTICE 89, 91 (Reiner Schulze & Dirk Staudenmayer eds., 2016); (16) Participatory Consumption, e.g., Opinion of the European Economic and Social Committee on ‘Collaborative or Participatory Consumption, a Sustainability Model for the 21st Century’, EUR. ECON. & SOC. COMM. (2014/C 177/01) (2014); (17) Relationship Economy, e.g., JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISES, AND LOCAL SUSTAINABLE ECONOMIES (2012); (18) Cooperative Economy, e.g., *id.*; (19) Grassroots Economy, e.g., *id.*; (20) New Economy, e.g., *id.*; (21) Leasing, Subleasing, or Licensing Economy, e.g., Gregory M. Stein, *Inequality in the Sharing Economy*, 85 BROOK. L. REV. 787, 796 (2020); and (22) ‘Go-it-Alone’ Economy, e.g., Daniel J. Hemel, *Pooling and Unpooling in the Uber Economy*, 2017 U. CHI. LEGAL F. 265, 286 (2017).

² Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 32–34 (2016).

³ See *infra* Part I – Theoretical Context.

business models. The judiciary, unsurprisingly primarily American, has in turn struggled to understand the various phenomena under consideration. Because of this, uncertainty has emerged in the American legal system and beyond.⁴ The lack of appropriate categories has destabilized the law in and around the use of the PUP model.⁵

Accordingly, creating a legal definition and an analytical framework of the Sharing Economy in the first instance is of paramount concern. Defining the Sharing Economy—a term which we believe is of limited use—provides the foundation for an analytical framework. Once we have established this broader framework, we believe that we are better able to understand, locate, and analyze the nature and activities of the PUP model. In other words, a legal analysis of the PUP model and its subclasses goes hand in hand with a legal analysis of the *Sharing Economy*, the *Access Economy*, the *Gift Economy*, and the *Exchange Economy*. The definitions of these categories are of paramount concern, allowing a more precise analysis and foundation on which future regulation can be based.⁶

This Article provides a framework for analyzing the PUP model and its subclasses, and places them in the context of the four economies to facilitate their legal analysis. The Article pursues this aim in four main parts. The theoretical context of the definition of the

⁴ Compare *O'Connor v. Uber Techs. Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (holding that plaintiffs, Uber drivers, were Uber's presumptive employees) with *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018) (categorising the plaintiff, a Grubhub delivery person, as an independent contractor of this company). Rashmi Dyal-Chand has explained that “[r]egulators have responded to the new business models proliferating in the sharing economy with a mixture of confusion, indignation, and alarm. In general, regulations have been reactive and piecemeal, rather than proactive or comprehensive. At times, regulators in different states and at the federal level have treated the same business practices quite differently. Often, in their haste to protect some market participants, they have ignored the needs of others.” RASHMI DYAL-CHAND, *COLLABORATIVE CAPITALISM IN AMERICAN CITIES: REFORMING URBAN MARKET REGULATIONS* 193 (2018).

⁵ As Judge Logue said in *McGillis v. Department of Economic Opportunity*, “we must decide whether a multi-faceted product of new technology should be fixed into either the old square hole or the old round hole of existing legal categories, when neither is a perfect fit.” 210 So. 3d 220, 223 (Fla. Dist. Ct. App. 2017).

⁶ See Zale, *supra* note 1, at 510 (arguing that “[d]eveloping a conceptual framework to ground the discourse about the sharing economy is critical from both a theoretical and practical perspective.”).

Sharing Economy is revisited and expanded upon in Part I. This part explores the ambiguity in the concept of the Sharing Economy and the problems this has posed from the point of view of legal categories. Part II provides the theoretical foundation in property law and contract law that is used throughout the Article. Part III includes a semantic and legal analysis of the terms *sharing* and *economy*, providing guidance for the next part of the Article. Part IV, the crux of the Article, proposes a legal definition of the phenomenon.

I. THEORETICAL CONTEXT

At its core, the Sharing Economy allows the creation of a business model where Platform Operators aggregate supply and demand via an interactive network, providing opportunity for people and businesses to meet their needs and put inactive assets or time into economic productivity.⁷ For instance, Uber aggregates information from Uber drivers (Providers) and Uber passengers (Users) through its platform and matches supply and demand for transportation services. Uber drivers, in turn, harness the idle capacity of their vehicles by providing these services.

The Platform Operators aggregate previously disaggregated information, consolidate it, and form a market which in turn they target to a larger audience: Users.⁸ This technology is successfully exploited by companies such as Uber, Airbnb, and TaskRabbit.⁹ A number of significant claims have been made about it, including changes in the economy and the creation of new economies, often denominated the 'Sharing Economy.'

Since the beginning of the Sharing Economy,¹⁰ the economy and society have been affected in a multitude of ways, both positively

⁷ Rauch & Schleicher, *supra* note 1, at 917.

⁸ Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEG. 147, 164 (2016).

⁹ *Id.* at 149.

¹⁰ The beginning of the "Sharing Economy" can be traced back to the Global Financial Crisis when the sharing firms Airbnb (2008) and Uber (2009) emerged, and the term "Sharing Economy" was first mentioned (2008). See Lobel, *supra* note 1, at 94 (arguing that "while the timeline is not set in stone, it is useful to mark 2008, with the founding of

and negatively. On the positive side, the Sharing Economy has created wealth,¹¹ job opportunities,¹² supplementary income,¹³ flexibility,¹⁴ inclusion,¹⁵ and a broader variety of services and products for consumers.¹⁶ On the other hand, the Sharing Economy has

Airbnb as the rise of the new wave of the platform—a stunning number of fast-growing of algorithm-enabled cyber-places where constituents transact.”); Thomas Puschmann & Rainer Alt, *Sharing Economy*, 58 BUS. INFO. SYS. ENG’G 93, 95 (2016) (contending that the term “Sharing Economy” was first mentioned by Lawrence Lessig in his 2008 book *Remix: Making Art and Commerce Thrive in the Hybrid Economy*); Inara Scott & Elizabeth Brown, *Redefining and Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553, 558 n.21 (2017) (explaining that even though Martin Weitzman wrote a book titled *The Share Economy* in 1984, this work is not about the phenomenon of the “Sharing Economy” being analyzed).

¹¹ PricewaterhouseCoopers projects that the total global revenues from five Sharing Economy sectors—travel, car sharing, finance, staffing, and music and video streaming—will increase from \$15 billion to around \$35 billion by 2025.

PRICEWATERHOUSECOOPERS, *THE SHARING ECONOMY* 1, 14, available at https://www.pwc.fr/fr/assets/files/pdf/2015/05/pwc_etude_sharing_economy.pdf [<https://perma.cc/S926-NRJV>].

¹² See, e.g., Shep Hyken, *The Gig Economy Opens the Door for Employment Opportunities*, FORBES (July 29, 2018), <https://www.forbes.com/sites/shephyken/2018/07/29/the-gig-economy-opens-the-door-for-employment-opportunities/#7f8ca9567662> [<https://perma.cc/E7VV-S4PT>].

¹³ See, e.g., Ruth Fowler, *The Reluctant Airbnb Host: Why I Rent My Spare Bedroom to Pay My Own Rent*, THE GUARDIAN (Aug. 1, 2017), <https://www.theguardian.com/technology/2017/aug/01/airbnb-host-rent-housing-crisis-los-angeles> [<https://perma.cc/6HHR-W8ZJ>]; see also John Collet, *More Australians Boost Their Income Through the Sharing Economy*, SYDNEY MORNING HERALD (May 1, 2018), <https://www.smh.com.au/money/planning-and-budgeting/more-australians-boost-their-income-through-the-sharing-economy-20180427-p4zc25.html> [<https://perma.cc/JG23-FFBK>].

¹⁴ See, e.g., S. Kumar, *3 Reasons to Cheer Uber and the Sharing Economy*, FORTUNE (July 20, 2015), <http://fortune.com/2015/07/20/uber-and-the-sharing-economy/> [<https://perma.cc/8N7W-JXLH>].

¹⁵ See, e.g., Sam Levin, *Airbnb Vows to be First Company to Defy Trump and Keep Employing Dreamers*, THE GUARDIAN (Sept. 7, 2017), <https://www.theguardian.com/us-news/2017/sep/07/silicon-valley-executives-dreamers-daca-trump> [<https://perma.cc/X2TQ-KK9J>].

¹⁶ See, e.g., Suzanne Bearne, *The Sharing Economy: A Money-Making Space Made for Startups*, THE GUARDIAN (Apr. 8, 2015), <https://www.theguardian.com/small-business-network/2015/apr/08/sharing-economy-startups-airbnb-business> [<https://perma.cc/ZU34-ZUQ4>].

facilitated murder,¹⁷ rape,¹⁸ suicide,¹⁹ discrimination,²⁰ fraud,²¹ low wages, job insecurity,²² and other negative effects.²³

The term “Sharing Economy” draws upon ideas of altruistic behavior in daily life.²⁴ One can think of an example where a person may pick up a coworker to share the drive to work. There is nothing unique or special about this activity. It is simply a demonstration of altruism, generosity, and collaboration. What is significant in the absence of the technologically facilitated Sharing Economy is that the behavior is limited to two people acting in a personal, non-commercial context. The car owner is using private resources while the coworker is not looking for a commercial arrangement but is relying on personal goodwill. While a change in the behavior—such that it becomes a regular event—may lead the coworker to offer some money to offset the costs of operating the vehicle, it remains fundamentally a personal, non-commercial arrangement. What then shifts

¹⁷ See, e.g., Emma Younger, *Airbnb Murder Accused Placed Guest in Headlock After Dispute Over Rent, Court Told*, ABC (May 22, 2018), <https://www.abc.net.au/news/2018-05-22/ramis-jonuzi-melbourne-airbnb-guest-death-brighton-east-court/9787996> [<https://perma.cc/X6GB-H3J8>].

¹⁸ See, e.g., Keith L. Alexander, *Uber Driver Convicted of Raping Female Passenger, Faces 20 Years in Prison*, WASH. POST. (Aug. 10, 2018), https://www.washingtonpost.com/local/public-safety/uber-driver-convicted-of-raping-female-passenger-faces-20-years-in-prison/2018/08/10/8221ca48-9cb8-11e8-8d5e-c6c594024954_story.html [<https://perma.cc/9M2Z-WN73>].

¹⁹ See, e.g., Tyler Pager & Emily Palmer, *Uber Driver’s Death Marks Seventh For-Hire Driver Suicide Within a Year*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/nyregion/uber-driver-suicide-for-hire-taxis-new-york.html> [<https://perma.cc/EZW7-VZRA>].

²⁰ See, e.g., Elaine Glusac, *As Airbnb Grows, so do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html> [<https://perma.cc/V7PP-9TMQ>].

²¹ See, e.g., Rebecca Smithers, *I Was Conned by a Fraudster Pretending to Be an Airbnb Host*, THE GUARDIAN (May 8, 2017), <https://www.theguardian.com/money/2017/may/08/conned-by-fraudster-airbnb-host> [<https://perma.cc/4VAC-2EY8>].

²² See, e.g., Steven Greenhouse, *False Freedom: Sharing the Scraps from the Perilous Gig Economy*, LITERARY HUB (Aug. 7, 2019), <https://lithub.com/false-freedom-sharing-the-scraps-from-the-perilous-gig-economy> [<https://perma.cc/4QQV-H52E>].

²³ See Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL’Y REV. 309, 311 (2016) (contrasting the arguments supporting the conventional narrative and the counternarrative of the Sharing Economy).

²⁴ See Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 197 (2017).

with the introduction of the PUP model? And further, when does it shift?

The critical factor disrupting these traditional relationships is a technological innovation: the development of the internet-based platforms. These platforms create a much wider web of interactivity providing an opportunity for people to meet or expand their private networks, allowing them greater access to people with certain needs or resources. This allows sharing at an unprecedented scale. It could indeed generate a Sharing Economy if sharing were to continue as the institutional norm and the platform was operated on a non-profit basis. At this point, however, the institutional norms often break-down. Some Platform Operators have looked for ways to profit and the denomination “Sharing Economy” becomes less applicable and of questionable accuracy.²⁵

Platform Operators are, for the most part, not altruistically motivated actors interested in sharing. Rather, as argued below, they are profit-driven entities.²⁶ Accordingly, they have discovered ways to monetize the otherwise altruistic sharing behavior.²⁷ They have shifted the use of the technology from sharing to profit-making, thus commoditizing altruism. However, they have continued to be characterized as contributing to the Sharing Economy despite not actually “sharing.”²⁸

Different kinds of practices and transactions are included under the concept of the “Sharing Economy,”²⁹ causing confusion in defining the phenomenon. Activities such as clothes swapping, home swapping, lending couches, dating platforms, online stores, a wide variety of services (such as car transportation, delivery, food preparation, dog walking, pet sitting, online streaming, personal parking

²⁵ See *infra* pp. 1037–42.

²⁶ See *infra* p. 1042.

²⁷ See *infra* p. 1042.

²⁸ See *infra* note 134.

²⁹ Juliet Schor explains that “[m]any organizations have been eager to position themselves under the ‘big tent’ of the sharing economy because of the positive symbolic meaning of sharing, the magnetism of innovative digital technologies, and the rapidly growing volume of sharing activity.” Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE (Oct. 2014), <https://greattransition.org/publication/debating-the-sharing-economy> [<https://perma.cc/2TZS-JTWU>].

valet, and butler, legal, medical, financial, and educational services), and renting of goods (such as film equipment, watches, houses, toys, offices, parking spaces, household tools, and bikes), are examples of transactions and practices that are bundled together under the term “Sharing Economy.”³⁰ This situation is problematic because it prevents appropriate delimitation of the phenomenon, which, in turn, hinders legal analysis and appropriate regulation.³¹

As the Sharing Economy spread, scholarship about the new “sharing” model emerged and became a hot topic. The Sharing Economy has been a topic of research in different disciplines, such as economics,³² geography,³³ tourism,³⁴ sociology,³⁵ business

³⁰ Janelle Orsi, for instance, includes in the scope of the “Sharing Economy” the following practices: cohousing communities, community gardens, social enterprises, community-owned enterprises, shared commercial kitchens, car-sharing groups, eco-villages, local currencies, barter networks, time banks, gift economies, community land trusts, grocery cooperatives, worker cooperatives, community-supported agriculture, community-supported kitchens, credit unions, creative commons licensing, housing cooperatives, childcare cooperatives, renewable energy cooperatives, tool lending libraries, co-working spaces, and collaborative consumption. ORSI, *supra* note 1, at 2–3. *See also* Scott & Brown, *supra* note 10, at 562 (providing examples of both “sharing” firms and practices considered part of the Sharing Economy).

³¹ As Hobbes noted, “[t]he first cause of [a]bsurd conclusions I ascribe to the want of [m]ethod; in that they begin not their [r]atiocination from [d]efinitions; that is, from settled significations of their words: as if they could cast account, without knowing the value of the numerall words, *one*, *two*, and *three*.” THOMAS HOBBS & W. G. POGSON SMITH, *HOBBS’S LEVIATHAN: REPRINTED FROM THE EDITION OF 1651* 35 (1909). Wesley Hohfeld also explains that

[e]ven if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression. As a matter of fact, however, the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.

Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–29 (1913-1914).

³² *See, e.g.*, Martin, *supra* note 1.

³³ *See, e.g.*, Lizzie Richardson, *Performing the Sharing Economy*, 67 GEOFORUM 121 (2015).

³⁴ *See, e.g.*, Cindy Yoonjoung Heo, *Sharing Economy and Prospects in Tourism Research*, 58 ANNALS TOURISM RES. 166 (2016).

³⁵ *See, e.g.*, Davide Arcidiacono et al., *Sharing What? The ‘Sharing Economy’ in the Sociological Debate*, 66 SOC. REV. 275 (2018).

management,³⁶ architecture,³⁷ and law.³⁸ As noted, however, no consensus has emerged on what the Sharing Economy is.³⁹ For example, the Sharing Economy has been defined as (1) a temporary access between consumers to underutilized physical assets, possibly for money;⁴⁰ (2) a group of systems that enable the sharing of underused assets or services, for free or for a fee, between individuals or organizations;⁴¹ and (3) an umbrella concept encompassing several information and communication technologies that endorse the consumption of goods and services through online platforms.⁴²

Other authors do not provide a specific definition of the Sharing Economy but single out specific elements they consider foundational to the phenomenon. For example, Lisa Gansky, one of the first authors to develop the idea of the Sharing Economy, describes it as the “Mesh.”⁴³ While Gansky does not provide a definition of the phenomenon, she does offer four characteristics of the “Mesh business”: (1) something that can be shared, (2) the use of advanced web and mobile data networks, (3) a focus on physical goods, and (4) the engagement with costumers through social media.⁴⁴ Similarly, Arun Sundararajan, who uses the term “Crowd-Based Capitalism,” does not provide a definition.⁴⁵ He does, however, propose four

³⁶ See, e.g., Pablo Muñoz & Boyd Cohen, *A Compass for Navigating Sharing Economy Business Models*, 61 CAL. MGMT. REV. 114 (2018).

³⁷ See, e.g., Richard Coyne & Tolulope Onabolu, *Blockchain for Architects: Challenges from the Sharing Economy*, 21 ARQ: ARCHITECTURAL RES. Q. 369 (2017).

³⁸ See generally, e.g., Lobel, *supra* note 1.

³⁹ See Valentin Clemens et al., *The Sharing Economy Landscape: Structuring Research from Airbnb to Zipcar*, 2020 ACAD. MGMT. PROC. 1, 4 (2020) (explaining, after a quantitative analysis of 590 articles on the Sharing Economy, that “[t]he wide dispersion of research fields has enticed researchers to engage in micro-analyses of one specific business model...within the sharing economy rather than pursuing the development of higher-level concepts and theories around it. This has led to isolated research streams that talk about similar phenomena with different languages.”).

⁴⁰ Koen Frenken & Juliet Schor, *Putting the Sharing Economy into Perspective*, 23 ENV'T INNOVATION & SOCIETAL TRANSITIONS 3, 5 (2017).

⁴¹ Rachel Botsman, *The Sharing Economy: Dictionary of Commonly Used Terms*, MEDIUM (Oct. 20, 2015), <https://medium.com/@rachelbotsman/the-sharing-economy-dictionary-of-commonly-used-terms-d1a696691d12> [<https://perma.cc/BE2F-Q5UT>].

⁴² Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS'N INFO. SCI. & TECH. 2047, 2047 (2016).

⁴³ GANSKY, *supra* note 1, at 5.

⁴⁴ *Id.* at 16.

⁴⁵ SUNDARARAJAN, *supra* note 1.

characteristics of the phenomenon: (1) "largely market-based," (2) "high-impact capital," (3) "crowd-based 'networks'" instead of centralized institutions, and (4) the blurring of lines—whether between personal and professional services, fully employed and casual labor, independent and dependent contractor, or work and leisure.⁴⁶ The same approach has been taken by Rachel Botsman and Roo Rogers who also find four underlying elements.⁴⁷ They refer to the phenomenon as "Collaborative Consumption," and identify it with: (1) critical mass, (2) idling capacity, (3) belief in the commons, and (4) trust among strangers.⁴⁸ Thus, the scholarly ideas on the Sharing Economy are broad, segmented, and, to a great extent using unrelated terms in the hope of identifying a singular underlying conceptual foundation.⁴⁹

Legal scholarship on the Sharing Economy is no different. While not as profuse as the wider business and related literature on the topic, current legal scholarship also discusses the Sharing Economy without a commonly accepted definition. Manifold definitions can be found in the legal scholarship. For instance, Lawrence Lessig, perhaps the first legal scholar to address the term "Sharing Economy,"⁵⁰ limits the phenomenon to non-monetary transactions as an alternative to the "Commercial Economy."⁵¹ In Lessig's definition, the term is limited to an economy where access is regulated by a set of social relations other than money.⁵² Conversely, Stephen R. Miller refers to the Sharing Economy as an economic model where people create and share goods, services, space, and money.⁵³ Daniel Rauch and David Schleicher define the Sharing Economy as a dynamic of reduction in transaction costs which permits disaggregated

⁴⁶ *Id.* at 27.

⁴⁷ BOTSMAN & ROGERS, *supra* note 1, at 75.

⁴⁸ *Id.*

⁴⁹ See Clemens et al., *supra* note 39, at 5 (claiming that "[t]he research in the field of the sharing economy is much more phenomenological than theoretical....Thus, most of the existing studies do not use or provide comprehensive theoretical frameworks....").

⁵⁰ See *supra* note 10.

⁵¹ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 145 (2008).

⁵² *Id.*

⁵³ Miller, *supra* note 8, at 150.

consumption.⁵⁴ Rauch and Schleicher include two broad categories under this term: (1) Asset Hubs, companies renting physical assets directly owned by such firms and (2) Peer-to-Peer Sharing Networks, networks that connect would-be sellers or workers with would-be buyers or employers.⁵⁵

By contrast, Vanessa Katz claims that “sharing” platforms are markets only for peer-to-peer services, rejecting Rauch and Schleicher’s Asset Hub category.⁵⁶ This difference explains why Katz, for example, defines the Sharing Economy as a business model where an online intermediary acts as a market for peer-to-peer services facilitating exchanges by lowering transaction costs,⁵⁷ whereas others, such as Lessig, use the term for non-profit activities.⁵⁸ Finally, also worth mentioning is Ryan Calo and Alex Rosenblat’s use. They uphold that the “sharing” model is an umbrella term which includes not only a group of techniques and practices that facilitate transactions among strangers through digital platforms, but also a rhetorical strategy to attract support while avoiding restriction and regulation.⁵⁹

Still, other legal scholars see no need to provide a definition of the term Sharing Economy but simply focus on elements, characteristics, or qualities that they consider are indicative. For example, Sofia Ranchordás claims that “[t]he Sharing Economy presupposes two elements: the existence of physical ‘shareable goods that systematically have excess capacity,’ and a sharing attitude or motivation.”⁶⁰ Kellen Zale, in turn, proposes four different characteristics associated with the Sharing Economy: (1) monetization of assets, (2) focus on the access to these assets instead on their ownership, (3) reliance on technology to allow the access to the assets, and (4) exclusive involvement of individuals rather than businesses in the

⁵⁴ Rauch & Schleicher, *supra* note 1, at 912.

⁵⁵ *Id.* at 913–15.

⁵⁶ Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1070 (2015).

⁵⁷ *Id.* at 1070.

⁵⁸ LESSIG, *supra* note 51, at 145.

⁵⁹ Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information and Power*, 117 COLUM. L. REV. 1623, 1625, 1670 (2017).

⁶⁰ Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI. & TECH. 413, 416 (2015).

Sharing Economy transactions.⁶¹ Finally, Janelle Orsi asserts that "[a]lthough it is hard to encapsulate the qualities of this new economy, it generally facilitates community ownership, localized production, sharing, cooperation, small-scale enterprise, and the regeneration of economic and natural abundance."⁶² Accordingly, the legal scholarship, like the broader scholarly context, is unclear in its use of the term and in fact, the underlying concept.

As the preceding analysis demonstrates, there is no common understanding of the phenomenon. First, there is no unanimous terminology of the phenomenon. It is referred to by a variety of terms, such as the "Sharing Economy," "The Mesh," "Crowd-Based Capitalism," and "Collaborative Consumption."⁶³ Further, as the analysis also shows, there is no consensus on the nature of the underlying phenomenon. While some authors do not define it, others refer to the phenomenon as an economy, a business model, or a set of techniques and practices. Finally, the analysis shows that there are no commonly agreed upon characteristics of the phenomenon. On one end of the spectrum, some authors understand the Sharing Economy model is essentially for-profit, refers to peer-to-peer (P2P) activities, deals exclusively with physical assets, and is not concerned about trust. On the other end, differing authors suggest that the model is not for profit, includes services and organizations in the transactions (P2B or B2P), and is associated with considerations about trust. This absence of agreement reflects underlying ambiguity in the concept of the Sharing Economy itself. As legal scholar Kellen Zale argues: "[t]he debate over the sharing economy thus remains frustrating and controversial in large part because we lack a doctrinally cohesive and normatively satisfying way of talking about the underlying activities occurring within the sharing economy."⁶⁴

⁶¹ Zale, *supra* note 1, at 527.

⁶² ORSI, *supra* note 1, at 2.

⁶³ See *supra* note 1 for more examples of denominations of the Sharing Economy.

⁶⁴ Zale, *supra* note 1, at 509–10; see also Bryan P. Schwartz & Ellie Einarson, *The Disruptive Force of the Sharing Economy*, 18 ASPER REV. INT'L BUS. & TRADE L. 221, 223 (2018) (arguing that the "[d]efinitional ambiguity demonstrates the paradox of the sharing economy, perceived as both an alternative to the capitalist system and an embodiment of it.").

This Article argues that the Sharing Economy model can be best understood by applying contract and property law. It argues that the allocation of contractual and property rights and duties form the heart of the transactions executed in the Sharing Economy model. For example, the Sharing Economy facilitates an unusual exercise of property rights by allowing use of private property by the public. To be properly understood, the extent of that usage must be revisited from a property law and contract law perspectives—a matter we can only touch upon in this definitional Article. A combined analysis of property law and contract law is, then, critical to understanding and addressing the Sharing Economy.

However, analysis of the Sharing Economy from both property and contract law perspectives has been largely overlooked. Most of the legal scholarship has based its analysis on non-legal concepts, effectively preventing a law-oriented discussion of its conceptual foundations.⁶⁵ To fill this gap, next, this Article provides a legally tailored definition and analysis of the Sharing Economy.

II. LEGAL THEORETICAL FOUNDATION

This part explains the concepts underlying the Sharing Economy by applying legal frameworks from property and contract law. The first theoretical foundation is drawn from Tony Honoré's work. While Honoré's focus was on the overall concept of "ownership," his analysis provides a framework for analyzing the content and allocation of property rights generally.⁶⁶ Honoré argues that certain incidents of ownership must be generally present for a person to be considered the owner of a thing.⁶⁷ These "standard incidents of

⁶⁵ For example, some legal scholars replicate non-legal definitions to discuss the phenomenon. See Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. R. 61, 76 (2015) [hereinafter Kreiczer-Levy, *Consumption*]; Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL'Y REV. 155, 174 (2017) [hereinafter Kreiczer-Levy, *Share*]; Shelly Kreiczer-Levy, *Property Without Personhood*, 47 SETON HALL L. REV. 771, 785 (2017) [hereinafter Kreiczer-Levy, *Property*].

⁶⁶ TONY HONORÉ, MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL (1987).

⁶⁷ *Id.* at 165. Things or property, following Kevin Gray's theoretical contribution, are understood as excludable resources for the purposes of this article. See *infra* p. 1012. Consequently, the terms thing(s), property and excludable resource(s) are used interchangeably throughout this article.

ownership" are defined as "those legal rights, duties, and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system."⁶⁸ Honoré's standard incidents of ownership, also called the "bundle of rights,"⁶⁹ are:⁷⁰

The right to possess: the right to have exclusive control of the thing;⁷¹

The right to use: the right to enjoy the thing;⁷²

The right to manage: the right to decide how and by whom the thing will be used;⁷³

The right to the income: the right to the benefits derived from the thing;⁷⁴

The right to the capital: the power to alienate the thing and the liberty to consume, waste or destroy it;⁷⁵

The right to security: the right to remain owner of the thing indefinitely as long as the owner remains solvent;⁷⁶

⁶⁸ HONORÉ, *supra* note 66, at 161. Honoré contrasts this greatest interest in the thing with easements, short leases, licenses, special property, and mere detention, which represent lesser interests. *Id.* at 175.

⁶⁹ Technically, Honoré's standard incidents of ownership together with Wesley Hohfeld's scheme of correlatives and opposites jural relations compound the "bundle of rights" perception of property. See J. E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) (explaining that "[i]n its conventional formulation, the bundle of rights thesis is a combination of Wesley Hohfeld's analysis of rights and...Honoré's description of the incidents of ownership."); DUNCAN SHEEHAN, *THE PRINCIPLES OF PERSONAL PROPERTY LAW* 4 (2011) (observing that "[t]his idea of the bundle of rights derives from a combination of Honoré and Hohfeld.").

⁷⁰ HONORÉ, *supra* note 66, at 165.

⁷¹ *Id.* at 166.

⁷² *Id.* at 168.

⁷³ *Id.*

⁷⁴ *Id.* at 169.

⁷⁵ *Id.* at 170. See also Penner, *supra* note 69, at 759 (explaining that "[t]he motivation behind grouping these powers and liberties together seems to be that these involve the extinction of the relationship between the owner and the thing, either by its transfer or its destruction.").

⁷⁶ See HONORÉ, *supra* note 66, at 171.

The incident⁷⁷ of transmissibility: indefinite transmission of the owners' interests to their lawful successors;⁷⁸

The incident of absence of term: lack of a term limiting the ownership interest;⁷⁹

The incident of residuary: meaning that the owner has a residual right to retake the ownership rights previously transferred to the holders of lesser interests;⁸⁰

The duty to prevent harm: the duty to prevent the thing from being used by the owner or by others to harm others;⁸¹

The liability to execution: the possibility to lose the ownership rights as a result of debts.⁸²

In analyzing the legal concept of ownership and the incidents of ownership, Honoré's work provides a framework to identify the specific property rights that exist, as well as the substantive content of these rights. The framework, therefore, identifies the specific incidents of ownership that could be transferred from the owner to a transferee.⁸³

The second useful analytical framework in property law is offered by Kevin Gray.⁸⁴ Gray focuses on the "propertisation" of resources or, in other words, the determination of whether a resource can be held as property.⁸⁵ Gray claims that a resource can only be "propertised" if it is excludable.⁸⁶ A resource is excludable "only if

⁷⁷ Following Hart's thought, Honoré refrains from calling this incident a right because, under his view, the exercise of a right must depend on the choice of the holder, which does not happen with this particular incident. *See id.* at 173. This claim can also be applied to the incidents of absence of term and residuary. *Id.*

⁷⁸ *Id.* at 172.

⁷⁹ *See id.* at 172–73.

⁸⁰ *Id.* at 165, 177–79.

⁸¹ *Id.* at 174.

⁸² *See id.* at 175.

⁸³ For purposes of this Article, "transfer" is understood as "[a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance", and "transaction" is "[a]ny activity involving two or more persons." *Transaction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁸⁴ Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252 (1991).

⁸⁵ *See id.* at 256.

⁸⁶ *Id.* at 268.

it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource."⁸⁷ This, according to Gray, can be completed if the resource is physically, legally, or morally excludable.⁸⁸ A resource is physically non-excludable when it is not possible to exclude others from access to the benefits of the resource, like the beam of light coming from a lighthouse.⁸⁹ A resource is legally non-excludable when it is not protected against others by legal means, such as an intellectual property regime.⁹⁰ Lastly, resources are morally non-excludable when they are "perceived to be so central or intrinsic to constructive human coexistence that it would be severely anti-social that these resources should be removed from the commons."⁹¹ Human freedoms illustrate this category. Property is, thus, "a power-relation constituted by legally sanctioned control over access to the benefits of excludable resources."⁹² Therefore, the thesis of "propertisation" of resources through excludability aids in determining whether a thing can be deemed property or not. In other words, whether it is a candidate for the Sharing Economy's property regime.

The last analytical framework necessary for our analysis of the Sharing Economy is the foundation of contract law. As legal scholar Samuel Williston observes, "[t]he requirements for the formation of a simple contract are: (1) [p]arties of legal capacity; (2) an expression of mutual assent of the parties to a promise, or set of promises, [and] (3) an agreed valid consideration."⁹³ Valid consideration in a

⁸⁷ *Id.*

⁸⁸ *Id.* at 269.

⁸⁹ *Id.*

⁹⁰ *Id.* at 273.

⁹¹ *Id.* at 280.

⁹² *Id.* at 295.

⁹³ SAMUEL WILLISTON, *THE LAW OF CONTRACTS* 17 (1924). The author explains that "[c]ontracts which derive their efficacy from the substance of the transaction rather than its form are called simple contracts." *Id.* at 10. *See also* *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2003) (explaining that the essential elements for the formation of a valid contract are: two or more contracting parties with the legal capacity to make a contract, consideration, mutual assent, an agreement that is sufficiently definite, and no legal prohibition preventing contract formation); *Hanson v. Water Ski Mania Estates*, 108 P.3d 481, 485 (Mont. 2005) (stating that "[i]t is well established that the essential elements of a contract, whether written or oral, are: 1) identifiable parties capable of contracting; 2)

bilateral contract, in turn, makes reference to “[m]utual promises in each of which the promisor undertakes some act or forbearance [consideration] that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration. . . .”⁹⁴ Consequently, following Williston, a binding contract arises from an agreement between persons with legal capacity who exchange mutual promises which are favorable to the promisee or unfavorable to the promisor.⁹⁵ Next, this Article continues to dissect the Sharing Economy by examining the two component terms, *sharing* and *economy*.

III. LEGAL SEMANTIC ANALYSIS OF THE TERM “SHARING ECONOMY”

To create a definition of “Sharing Economy,” the terms *sharing* and *economy* must be analyzed. This part is divided into three subsections: the first subsection is aimed at the legal analysis of the term *sharing*; the second addresses analysis of the term *economy*; and the final considers their potential combination in law and draws some conclusions.

A. Legal Analysis of the Term “Sharing”

The Sharing Economy, as an umbrella concept, includes a range of different activities, transfers, and practices. For example,

consent of these parties; 3) a lawful object; and 4) sufficient cause or consideration.”); *Perlmutter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409, 414 (N.D. Ohio 1976) (asserting that the essential elements of a contract include an offer and acceptance, contractual capacity, consideration, a manifestation of mutual assent and legality of object and of consideration).

⁹⁴ WILLISTON, *supra* note 93, at 215. *See also* *Finlay v. Swirsky*, 103 Conn. 624, 631 (1925) (“A consideration has been defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.”); *Osborne v. Locke Steel Chain Co.*, 153 Conn. 527, 531 (1966) (arguing that “[i]n defining the elements of the rule, we have stated that consideration consists of ‘a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.’ An exchange of promises is sufficient consideration to support a contract.” (citation omitted) (quoting *Finlay*, 103 Conn. at 631)); *Perlmutter Printing Co.*, 436 F. Supp. at 414 (defining consideration as “the bargained for legal benefit and/or detriment”).

⁹⁵ WILLISTON, *supra* note 93, at 17.

transportation services provided by Uber’s drivers and paid by Uber’s Users, or lodgment provided by Airbnb’s Providers and paid for by Airbnb’s Users, are examples of these activities, transfers, and practices.⁹⁶

Black’s Law Dictionary provides two definitions of the verb *to share*: (1) “[t]o divide (something) into portions” or (2) “[t]o enjoy or partake of (a power, right, etc.).”⁹⁷ Three different concepts of the verb *to share* can be deduced from these definitions. First, *sharing* can be understood as dividing something into portions. In this definition, the verbs *to share* and *to divide* are synonymous. The definition applies to cases such as *sharing*—or dividing—of profits under a partnership agreement. As the Sharing Economy is understood today, it cannot be appropriately described as dividing or partitioning a thing.

The second definition refers to *sharing* as the enjoyment of a right, power, or other legal category.⁹⁸ It conceptualizes the verb *to share*, perhaps oddly, as an individual behavior rather than a collective one, in that one can “enjoy” a right without the involvement of others. However, this individual behavior does not describe the transfers and transactions performed within the Sharing Economy, which necessarily involve multiple parties. Thus, *sharing* as enjoyment is not a suitable definition to explain legally the term *sharing* within the overall term “Sharing Economy.”

The third definition, *sharing* as partaking,⁹⁹ provides a better description of the phenomenon and so is helpful for the analysis. Partake means to “become involved with or take part in something with other people.”¹⁰⁰ In this definition of the term, the verb *to share* is understood as being involved with or taking part in a right, power,

⁹⁶ Note that these activities, transfers, and practices indicate the association of the Sharing Economy with the verb *to share* and not the noun *share*. Because of this, this analysis focuses on the verb *to share* instead of the noun *share*. The noun *share*, when used to mean a part of something—as in a *share* of an estate or *shares* of a corporation—is not part of this analysis.

⁹⁷ *Share*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Partake*, CAMBRIDGE DICTIONARY, available at <https://dictionary.cambridge.org/dictionary/english/partake> [<https://perma.cc/XG47-8RVG>].

or something else with another person. For example, when *A* lends *B* a laptop for one day, *B* becomes involved in the property rights *A* holds as the owner of the laptop. Applying this definition to our property analysis, we see that *sharing* is properly understood as the owner of a thing allowing others to be involved or taking part of the owner's rights in that thing.

Thus, from a legal perspective, *sharing* can be defined as the partial transfer of the standard incidents of ownership—the “bundle of rights.” *Sharing* is not about transferring the ownership of the thing—namely, all the standard incidents of ownership—but the partial transfer of one or more of the bundle of rights.¹⁰¹ As a result, *sharing*, from a property law perspective, is the transfer of some incidents of ownership, such as the right to possess or the right to use, without transferring the ownership of the thing.¹⁰² It is an incomplete or partial transfer of property rights.

The term *sharing* has another layer. As a verb, the term includes an action, a transfer element, a mechanism, or a process that allows parties previously not partaking to participate. This transfer aspect of the term, as this Article argues, is critical to the definition of the term “Sharing Economy.” This facet of the word, not found in *Black's Law Dictionary*, draws attention to the absence of consideration in *sharing* transfers. Sharing transactions do not contain

¹⁰¹ See Kreiczer-Levy, *Share*, *supra* note 65, at 156, 188 (arguing that “share” is a type of access and access is a casual, short-term use of property); Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. 909, 913 (2017) (explaining that “[w]hen I *share* property, what is mine does not become yours; it actually remains mine.”).

¹⁰² Even though the entitlement of one or more standard incidents of ownership is required to *share*, a person is not required to be the owner of the thing—namely, the holder of all the incidents of ownership—in order to *share* it. For example, if *B* is a tenant in *A*'s apartment, *B* is not entitled to the entire bundle of *A*'s rights but just to some of them—e.g., the right to possess, the right to use and the right to manage. However, *B*, exercising his or her right to manage, can allow a relative (*C*) to stay in the property while *B* is overseas by transferring his or her rights to possess and use the apartment to *C*. Here, *B* would have *shared* to *C* the apartment owned by *A*. This perception is consistent with the legal maxims *nemo dat quod non habet* (“no one gives a better title to property than he himself possesses”) and *nemo plus juris ad alienum transferre potest quam ipse habet* (“[n]o one can transfer to another a greater right than he himself might have”). *Share*, BLACK'S LAW DICTIONARY (11th ed. 2019).

mutual promises but are unilateral promises of the owner¹⁰³ to share their property. In other words, the owner of the thing makes a gratuitous transfer of certain incidents of ownership i.e. without any quid pro quo.¹⁰⁴ Consequently, no contract is created between the parties involved in *sharing* transfers because one of the essential elements for the formation of contracts—consideration—is not present in the transfer.¹⁰⁵ A *sharing* transfer is a *nudum pactum*¹⁰⁶ or “one-way” agreement that is not legally enforceable as a contract.¹⁰⁷ Therefore, in an event properly described as a *sharing* transfer, only the owner is making a promise: a gratuitous, partial transfer of his or her bundle of rights to another person who, without giving anything in exchange, will enjoy such rights.

The doctrine of consideration is crucial in the delineation of the term “Sharing Economy.” Without this doctrine, businesses which are radically different seem similar. They will be equally included under the umbrella concept of the Sharing Economy. The difference

¹⁰³ Although *sharing* transactions can also be started by non-owners—see *supra* note 102—the example of the owner (holder of all incidents of ownership) as the actor who *shares* the property is maintained for purposes of clarity.

¹⁰⁴ For example, Daniel B. Kelly differentiates *sharing* and *exchange* transactions by explaining that, “[u]nlike sharing, which entails a gratuitous transfer, exchange entails a transfer with consideration.” This explains why the author mentions gratuitous licenses, gratuitous easements and gratuitous bailments as examples of *sharing* transactions. Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 873, 886, 896, 901 (2013). See also Dave Fagundes, *Why Less Property is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361, 1380 n.93 (2018) (identifying gratuitous transfers as actual *sharing*); Diamond Smith, *Renting Diversity: Airbnb as the Modern Form of Housing Discrimination*, 67 DEPAUL L. REV. 581, 585 (2018) (arguing that “[t]he word ‘sharing’ has positive connotations, evoking thoughts of gratuitous acts towards fellow members of society.”).

¹⁰⁵ See *supra* p. 1013. See also Stein, *supra* note 1, at 796 (explaining that the word “share” connotes “bestowing something without consideration, as when a child shares their candy with a classmate, where it would be unusual to expect payment.”).

¹⁰⁶ See PHILIP CLARKE & JULIE CLARKE, CONTRACT LAW: COMMENTARIES, CASES AND PERSPECTIVES 114 (2d ed. 2012) (explaining that without consideration, the agreement “is a *nudum pactum* and unenforceable as a contract.”); *Nudum Pactum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a *nudum pactum* as an “agreement that is unenforceable as a contract because it is not ‘clothed’ with consideration.”).

¹⁰⁷ However, depending on the applicable jurisdiction, unilateral promises may be enforceable by other means as the inclusion of the promise in a deed (formal contract) or the application of the doctrine of promissory estoppel. See CLARKE & CLARKE, *supra* note 106, at 114–15.

between these businesses is simply the contractual doctrine of consideration. For example, both Airbnb¹⁰⁸ and CouchSurfing¹⁰⁹ are platforms aimed to provide lodging to the public. While the former offers accommodation to people in exchange for money, the latter offers accommodation to people for free.¹¹⁰ This difference is important because the legal relationship between the parties on the Airbnb platform is markedly different from the legal relationship between the same parties if they were to use the CouchSurfing platform. Airbnb arrangements include consideration and as a result, there is a binding contract between such parties with all the rights and duties that entails.¹¹¹ However, by using the CouchSurfing platform the opposite is true: namely, there is no consideration and, therefore, there is no contract and no binding obligations on any of the parties.¹¹² Thus, unlike contracts, *sharing* transactions do not contain mutual promises but are solely the unilateral promises of the owner.

Hence, the verb *to share*—or *sharing*—can be defined from a legal perspective as the gratuitous transfer of one or more—but not all—property rights a person has in respect of a thing—an excludable resource.¹¹³ *Sharing* occurs when a non-owner partakes of the owner's property rights in the owner's resource. This occurs when the owner transfers one or more—but not all—of the bundle of rights

¹⁰⁸ See *How Airbnb Works*, AIRBNB, <https://www.airbnb.com.au/d/howairbnbworks> [https://perma.cc/8F4P-7EYD].

¹⁰⁹ See *About Us*, COUCHSURFING, <https://about.couchsurfing.com/about/about-us/> [https://perma.cc/2YJH-S8A6].

¹¹⁰ *Compare Payments, Pricing, and Refunds*, AIRBNB, <https://www.airbnb.com.au/help/topic/1359/payments-pricing-and-refunds> [https://perma.cc/ZZ4A-9B9F] with *Frequently Asked Questions*, COUCHSURFING, <https://about.couchsurfing.com/about/faq/> [https://perma.cc/2YJH-S8A6].

¹¹¹ See *Terms of Service*, AIRBNB, <https://www.airbnb.com.au/help/article/2908/terms-of-service> [https://perma.cc/W6UF-U7W3].

¹¹² See COUCHSURFING, *supra* note 109.

¹¹³ Kelly illustrates that “[s]haring enables donative transfers without requiring the transfer of ownership....” Kelly, *supra* note 104, at 877. Also, Donald J. Kochan explains that “[s]haring occurs when an owner-sharer grants a nonowner-sharer permission to use, possess, or access sharer’s property without transferring an ownership interest and without an ex ante legal obligation to so share.... ‘Sharing,’ as the term is usually used in recent literature, is a special brand of permission; the retained ownership interest and the right of revocability distinguishes ‘sharing’ from these other types of relationships.” Kochan, *supra* note 101, at 945, 947.

to the non-owner for free—partial transfer.¹¹⁴ As Kochan, states: “[t]he sharee is merely partaking in a privileged use of the property as a result of the sharer’s choice.”¹¹⁵ This definition provides a strong demarcation of activities which can rightly be categorized as *sharing* and those which cannot. Only a partial, gratuitous transfer can be correctly categorized as *sharing*. All else is excluded.

B. Legal Analysis of the Term “Economy”

Black’s Law Dictionary defines economy as (1) “[t]he management or administration of the wealth and resources of a community (such as a city, state, or country)”, (2) “[t]he sociopolitical organization of a community’s wealth and resources”, and (3) the “[r]estrained, thrifty, or sparing use of resources; efficiency.”¹¹⁶ From a legal standpoint, therefore, the term economy is focused on the organization and use of the wealth and resources of a community.¹¹⁷ It encompasses any kind of transfer that facilitates a community’s management of its wealth, whether consideration-based transactions or *sharing*-based transfers. A community may consider sharing as an appropriate form of managing, organizing, or efficiently using its wealth and resources. Accordingly, the use of the term “economy” as part of the overall term “Sharing Economy” could be considered appropriate if it is being used to denote gratuitous partial transfers allowing communities to efficiently manage their resources.

This initial analysis, however, is incomplete as it does not encompass all activities commonly cast under the umbrella of the “Sharing Economy,” nor does it effectively delineate or describe

¹¹⁴ Transactions that suppose a total transfer of the bundle of rights, thus, should not be considered *sharing* transactions from a property law perspective even if they take the legal form of granting co-ownership. See Kochan, *supra* note 101, at 939 (contrasting sharing—as a time- or purpose-limited inclusion—with the transfer of ownership). According to the author, in “sharing” circumstances, “ownership remains with the sharer. If an individual simply sells her property to another or transfers part of her ownership interests, she may be giving someone an ‘ownership share’ in the property, but she is not engaging in ‘sharing’....The sharee is simply consuming resources in an access-related, rather than ownership-related, capacity.” *Id.*

¹¹⁵ *Id.* at 944.

¹¹⁶ *Economy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹⁷ *See id.*

adequately apparently similar activities. To achieve this outcome, we must carefully consider varying types of transactions which incorrectly apply the term “Sharing Economy.”

This Article has argued that there are two characteristics which are necessary in order for an action to properly fall into the category *sharing*: (1) a partial transfer of property rights in a resource and (2) a gratuitous transfer. Yet, many parties include paid transfers and services when using the term “Sharing Economy.”¹¹⁸ Next, this Article will argue that these are incorrectly included in the concept of the Sharing Economy.

Using this set of binaries—complete versus incomplete property transfers and gratuitous versus paid transactions—we can distinguish four different types of *economies*. Based on the property and contract law analysis above, we propose the Economies Matrix below (See *Figure 1*). In this matrix, the left- and right-hand sides—the contractual element—represent the existence or non-existence of consideration and, therefore, the creation or not of a contract. The upper and lower division of the matrix denotes the transfer of the total bundle of rights or less—the property element.

¹¹⁸ See *supra* Part I.

Economies Matrix (Figure 1)

		<i>Transfer of Ownership</i> (Total transfer of the Bundle of Rights)			
<i>Consideration</i> (Contract)		<i>Exchange Economy</i>		<i>Gift Economy</i>	
		<i>Access Economy</i>		<i>Sharing Economy</i>	
		<i>Non-Transfer of Ownership</i> (Partial transfer of the Bundle of Rights)			
				<i>No Consideration</i> (No contract)	

As is evident from the diagram, this legal taxonomy of *economies* creates four categories. The top part of the matrix contains only those categories of transactions that comprise a complete transfer of the bundle of rights or provide a service. More particularly, these transactions must include Honoré’s right to the capital, right to security, incident of transmissibility, incident of absence of term, and incident of “residuarity,”¹¹⁹ or must provide a service.

With respect to the lower half of the matrix, only those transactions that do not purport to transfer the same set of rights and incidents are included. It represents partial transfers of the bundle of rights. In other words, the *Access Economy* and *Sharing Economy* preclude the transfer of Honoré’s right to the capital, right to security, incident of transmissibility, incident of absence of term, and incident of “residuarity.”

Turning to the contractual division, the left-hand side of the matrix contains those transactions that are consideration-based and, therefore, create a contract. Conversely, the right-hand side of the matrix incorporates transactions that do not create a contract because they lack consideration.

¹¹⁹ See *supra* p. 1011.

Next, we discuss the matrix categories individually. Note that these categories can be widely applied to transactions across different platforms. As our analysis is focused on the behavior facilitated by internet-based platforms, we use examples of activities which have been included—often incorrectly—under the umbrella term “Sharing Economy” and are platform based.

The most common and widely understood category of transactions is the *Exchange Economy*, which is represented on the upper left of the matrix. It is characterized by the exchange of goods and services, either for money or other consideration. As previously stated, “exchange entails a transfer with consideration.”¹²⁰ Exchanges are not gratuitous transactions. Rather, these transactions are bound by contracts, transfers for value. In our classification matrix, the category is limited to contract-based transfers which include the full bundle of rights. It also captures transactions for services. Thus, this category includes transactions currently, but incorrectly, associated with the “Sharing Economy.” Examples include transactions made via TradeMade¹²¹ and Letgo,¹²² as well as Uber and other so-called ride-sharing services.

The second category, termed the *Gift Economy* and on the upper right of the matrix, excludes those transactions which require consideration and only includes those gratuitous transactions either for services or for the transfer of the entire bundle of property rights.¹²³ For example, donations on sites such as Ziilch, Leftoverswap, and

¹²⁰ See Kelly, *supra* note 104, at 873.

¹²¹ TradeMade is an online platform that allows people to trade items. See *Our Mission, Our Story*, TRADEMADE, <http://www.trademade-app.com/the-mission/> [<https://perma.cc/M4B6-V2HJ>].

¹²² Letgo is an online platform for buying and selling second-hand goods. See *Who We Are*, LETGO, <https://we.letgo.com/> [<https://perma.cc/4LGD-YQTP>].

¹²³ See *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (explaining that “gifts” suppose the transfer of property and arise from detached and disinterested generosity, not from a moral or legal obligation or as a payment in return for services rendered); see also RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 135–36, 148, 171, 197 (2009) (proposing four definitional elements of the gift: (1) gratuitousness, which in the Common Law legal system “involves a transaction without a valid legal consideration”; (2) a subjective element, which in the Common Law tradition refers to the donative intent; (3) an *inter vivos* transfer, which refer to “gratuitous transfers that take place during the donor’s lifetime”; and (4) the gift object, which in the Common Law system is not restricted to a particular type of property).

Freecycle fall into this category.¹²⁴ Again, although some parties include these transactions within the umbrella concept of the “Sharing Economy,” we have demonstrated they are not.

The third category, termed the *Access Economy* and placed on the lower left, includes only those transactions that require both consideration and involve a partial transfer of property rights.¹²⁵ Examples of this type of transactions, where access to property is paid for, include Airbnb, RentMyWardrobe, and Getaround. These transactions will be misclassified if they are linked to the *Sharing Economy*—a common error.

Finally, the fourth category on the lower right, *Sharing Economy*, is limited to those transfers bereft of consideration and which transfer only some but not all of the property rights.¹²⁶ This latter category is the only true category properly denominated “Sharing Economy.” The most well-known example is CouchSurfing, but there are other examples such as TrustRoots and Bewelcome.¹²⁷

Every transfer and transaction commonly labelled “Sharing Economy”, therefore, can be included in the four categories of our matrix of *economies* differentiated by the doctrine of consideration and the legal concept of ownership (bundle of rights). The *Exchange* and *Gift Economies* include a grant of title—the bundle of rights *in totum*. By way of contrast, with the *Access Economy* and the *Sharing Economy*, the owner maintains the ultimate legal title of the resource, thus the transfer of property rights is only partial. Regarding

¹²⁴ In fact, this category is perhaps the foundation for the whole concept of the “Sharing Economy.” Early forays into the use of the internet for the sharing and dissemination of goods and services created great disruption and set precedents for how legal rights would develop and business models could be created. These early sites and services included free services such as Napster, Linux, and Wikipedia.

¹²⁵ See Zale, *supra* note 1, at 533 (defining access as temporary possession or use of property); see also Kochan, *supra* note 101, at 939 (contrasting access—as a time-or purpose-limited inclusion—with the transfer of ownership); see, e.g., Kreiczer-Levy, *Share*, *supra* note 65, at 160 (“In typical access transactions, owners allow short-term use of their car, bike, drill, or ladder to non-owners in exchange for monetary compensation.”).

¹²⁶ Lawrence Lessig, therefore, was right when, in 2008, he limited the ‘Sharing Economy’ to non-monetary transactions. See *supra* p. 1007.

¹²⁷ TrustRoots and BeWelcome are online platforms with the same purpose of CouchSurfing: to connect people who offer free accommodation with people who need it. See TRUSTROOTS, <https://www.trustroots.org/> [https://perma.cc/96VB-48V3]; BEWELCOME, <https://www.bewelcome.org/> [https://perma.cc/TU9T-C374].

the contractual element, the *Exchange Economy* and the *Access Economy* both require consideration, relying on a contract. Conversely, the *Gift Economy* and the *Sharing Economy* both suppose the absence of consideration, hence the absence of contract.¹²⁸

Two final observations with respect to the *Access Economy* and *Sharing Economy* are necessary. First, in situations where the transaction is for the provision of services rather than the provision of goods, there can be no analysis of property rights. These transactions involve rights *in personam* rather than rights *in rem*.¹²⁹ Therefore, transactions related to the provision of services will always be positioned within either the *Exchange Economy* (when consideration is present) or the *Gift Economy* (when consideration is missing). These are simply contracts for service.

Second, when non-individualized fungible choses in possession—that is to say, interchangeable goods¹³⁰—are the subject of the transaction, that transaction can only be positioned within the *Exchange* or the *Gift Economies*. The transfer of these types of goods is premised upon their consumption and so entails the transmission of the whole bundle of rights (ownership) because the transferor does not expect to receive the same thing in return. Rather, the transferor expects the return of an equivalent in terms of quantity and quality to replace that which has been consumed.¹³¹

¹²⁸ See Penner, *supra* note 69, at 753 (explaining that sharing and giving are uses within the right to property that gratuitously benefit others); ORSI, *supra* note 1, at 97 (“[I]t’s important to acknowledge here that the things we provide for one another in the spirit of generosity, nurturing, or gift economy are ultimately enforced by social expectation, not by legal contract.”); see also LESSIG, *supra* note 51, at 119 (“Money in the sharing economy is not just inappropriate; it is poisonous.”).

¹²⁹ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 26 YALE L. J. 710, 718 (1916-1917).

¹³⁰ See SHEEHAN, *supra* note 69, at 28 (arguing that “fungibility is usually defined in terms of physical interchangeability—in other words it physically does not matter whether the claimant has one ton of barley, or oil rather than a different ton of the same substance from the given bulk.”); F. H. LAWSON & BERNARD RUDDEN, *THE LAW OF PROPERTY* 25 (2d ed. 1982) (explaining that “goods which are normally fungible can be treated as individuals. Thus coins, if valued for their rareness or their aesthetic or archaeological interest, are not fungible, because they cannot be replaced by others.”).

¹³¹ See LAWSON & RUDDEN, *supra* note 130, at 25 (arguing that fungible goods “can be replaced by equal quantities and qualities, and are estimated by weight, number, or measure.”).

It creates and relies on rights *in personam* rather than rights *in rem*.¹³² Transactions dealing with non-individualized fungible choses in possession, thus, will always be positioned within either the *Exchange Economy* (when consideration is present) or the *Gift Economy* (when consideration is absent).

C. Summary

The foregoing analysis makes it clear that the common element in these activities—the new platform-based behaviors and practices rapidly spreading around the globe—is not *sharing*. Rather, the commonality among them all is the platform underlying the interactions, transfers, and transactions among individuals, groups of people, and businesses for a range of purposes.

In our analysis we have identified the distinct features of four types of activities facilitated by Platform Operators in terms of contract and property law, and we have created distinct categories for their analysis. For example, well-known Platform Operators can be readily located in the *Exchange Economy* (e.g., Uber), *Gift Economy* (e.g., Zilch), *Access Economy* (e.g., Airbnb), or *Sharing Economy* (e.g., CouchSurfing). The taxonomy, thus, helps understand that what has mistakenly been grouped together under the umbrella term “Sharing Economy” is better understood as a collection of platform-based transactions.

Further, these platform-based transactions do not form a singular type of *economy*. Rather, they can be categorized as falling into one of four well-understood economies. The taxonomy thus helps illustrate that the apparent commonality of these activities is more superficial than actual. Rather, what causes them to be grouped together is the use of the platform technology that allows disaggregated resources to be aggregated and distributed through market or

¹³² “An example may help. If I borrow \$20 from you and promise to repay it, I owe you \$20. You do not expect to get the same \$20 note back. Instead, I have a personal obligation to pay which corresponds to your personal right to be paid \$20. This is a right *in personam* which can be enforced against me, regardless of what has become of the \$20 note I borrowed In contrast, if I borrow your book and promise to return it, you continue to own the book. In addition to my promise, you have a right *in rem* which is enforceable against me because I have your book.” ROBERT CHAMBERS, AN INTRODUCTION TO PROPERTY LAW IN AUSTRALIA 7 (3d ed. 2013).

quasi-market type institutional arrangements, creating a new business model.

Three main conclusions are drawn from this Part. First, a range of different transactions are commonly and mistakenly lumped together in the term “Sharing Economy.” These transactions neither exclusively nor necessarily involve *sharing*.¹³³ Second, the issue is not one of *economies* per se. Rather, it is about the use of platform technology and the creation of a new legal structure. The common denominator of these transactions is the PUP model, not the economy where it takes place. Finally, the term “Sharing Economy” is therefore incorrect and misleading to denominate all new platform-based transactions.¹³⁴ Next, this Article examines the PUP model in detail.

¹³³ See Scott & Brown, *supra* note 10, at 570 (concluding the following as regards the “sharing” companies Zipcar, Etsy, and WeWork: “Put simply, there is no ‘sharing’ in the millions of transactions that take place on these and many other so-called ‘sharing’ platforms.”); John Infranca, *Intermediary Institutions and the Sharing Economy*, 90 TUL. L. REV. ONLINE 29, 30 (2016) (contending that “[i]t has become a well-worn truism that little, if any, actual sharing occurs in the ‘sharing economy.’”).

¹³⁴ See Stemler, *supra* note 24, at 207 (arguing that “[d]espite the common perception, the term ‘Sharing Economy’ is clearly a misnomer . . . dominant companies within the Sharing Economy (Uber, Lyft, Airbnb, etc.) rarely enable sharing as it is commonly understood.”); Scott & Brown, *supra* note 10, at 556 (contending that “[a]nother risk to consumers concerns the mistaken assumption that sharing economy companies always benefit society. Because members of the original sharing economy often touted a social and environmental mission, new sharing economy companies may benefit unjustly from a misperception that they are socially beneficial. Just as firms once engaged in ‘greenwashing,’ some have suggested that organizations now engage in ‘sharewashing’—claiming illusory benefits related to the sharing concept.”); Zale, *supra* note 1, at 525 (explaining that “[l]abels are powerful agenda setters, and the intuitively positive connotations of the word ‘sharing’ may not make it the most objective moniker.”); see Schwartz & Einarson, *supra* note 64, at 223 (observing that “[o]ther academics are wary of the use of the word ‘sharing,’ since activities in the sharing economy are an economic exchange not unlike commercial relationships. Given that the sharing economy is anchored firmly in free market principles, financial gain and transactions motivated by self-interest, ‘sharing’ may be a misnomer.”); see also Stein, *supra* note 1, at 801 (“The term ‘sharing’ is deceptive in one sense, for the so-called sharing economy is an anti-sharing economy in some ways . . .”).

IV. PUP MODEL: PLATFORM OPERATOR-USER-PROVIDER

As noted, this Article argues that the critical change in economy arises from technological innovation—the development of the PUP model. We noted that the PUP model creates a much wider network of interactivity providing an opportunity for people to meet their needs and put inactive assets or time into economic productivity. It achieves this by aggregating and marketing the previously disaggregated resources to a greater audience. This new technology creates opportunities in all four distinct parts of the economy: in the for-profit *Exchange* and *Access Economies*, and in the non-profit *Sharing* and *Gift Economies*.

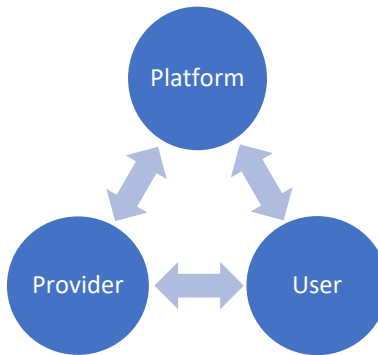
Crucially, from a legal standpoint, the PUP model inserts an intermediary, a third party into what were previously private, personally based one-on-one transactions and interactions, some of which were gratuitous while others were for profit. From an economic point of view, in some instances, the technological innovation has fundamentally altered the nature of transfers or services and has changed the viability of the activity from a one-off or mode of additional income to a main source of income, particularly in the platforms through which Providers supply services, such as Uber, Lyft, and TaskRabbit.

What is particularly significant for purposes of our analysis are the implications of the for-profit Platform Operators, notably, those that do not belong to the true *Sharing Economy*. These Platform Operators, such as Uber, Airbnb, and TaskRabbit, while seeking the rhetorical shelter of the term “Sharing Economy,” are in fact distinct forms of businesses, creating new types of legal relations, or at least creating doubt about the applicability of existing legal categories. In the next Part, we analyze this for-profit model in greater detail using the prior contract and property analysis as set out in the matrix of *economies* above.

A. Defining Elements of the PUP Model

From a legal perspective, the PUP model has two defining properties or elements. First, it has a triangular legal structure¹³⁵ which involves three actors (See *Figure 2*): (1) a *Platform Operator* which using technology provides aggregation and interactivity to create a legal environment by setting the terms and conditions for all the actors; (2) a *User* who consumes the good or service on the terms and conditions set by the Platform Operator; and (3) a *Provider* who provides a good or service also abiding by the Platform Operator's terms and conditions.¹³⁶

Figure 2



It is important to note that each of the bi-directional arrows represents legal relationships. They indicate rights of contract or transfer of property rights among the parties. Additionally, the three actors are not qualified, namely, they can be any type of person, such

¹³⁵ Understanding “structure” as “[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together. . . .” *Structure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹³⁶ Platform Operators, thus, are not providers of the goods and services under the PUP model. See Lobel, *supra* note 1, at 100 (arguing that “[platform] companies are not selling the thing itself: the service, the product, the content. Rather, they are selling access to the software, the matching algorithms, and a digital system of reputation and trust between their users.”). This explains why bilateral structures—such as Netflix, where streaming services are provided directly to consumers; CapitalBikeShare, where the company is the owner of the bikes offered to the public; and Affirm, where direct loans are directly disbursed by the firm—are not part of the PUP model. *Id.*

as a business entity (artificial or legal person) or an individual (human or natural person).

The second element of the PUP model concerns the active role of Platform Operators. Platform Operators are at the core of the structure because they operate the technological platform¹³⁷ for transactions to occur by both aggregating information and, in many instances, supplying ancillary services, such as facilitating payments required to engage in the provision and consumption of goods and services. Platform Operators administer the technology which creates the environment in which the actors operate and upon which the whole model is founded.¹³⁸ This critical role allows Platform Operators to dictate the terms and conditions of the legal arrangements

¹³⁷ See Hamari et al., *supra* note 42, at 2050 (explaining that this phenomenon “operates through technological platforms, such as a website or mobile app. . .”). This technological platform provided by the Platform Operator is enhanced by and dependent on “the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets.” See Lobel, *supra* note 1, at 94. According to Teresa Rodríguez-de-las-Heras, “[e]lectronic platforms are self-regulated communities managed by a platform operator. Despite that some functions can be designed and implemented to operate on a decentralized basis . . . electronic platforms are essentially centralized structures.” Teresa Rodríguez-de-las-Heras, *Rules for Electronic Platforms: The Role of Platforms and Intermediaries in Digital Economy, a Case for Harmonization*, in MODERNIZING INTERNATIONAL TRADE LAW TO SUPPORT INNOVATION AND SUSTAINABLE DEVELOPMENT – PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 146, 149 (United Nations Commission on International Trade Law, 2017).

¹³⁸ As part of the 2017 Congress of the United Nations Commission on International Trade Law, Rodríguez-de-las-Heras explained:

Electronic platforms, in all their variants (e-marketplaces, sharing-based platforms, business communities, social networks, crowdfunding platforms) are and operate as closed electronic environments. . . . The difference between an open environment and a closed one is essentially based on a legal factor...the closing of an environment is achieved by the use of a contractual infrastructure that create a contract-based trustworthy context for the users, self-contained, self-regulated, and, to the maximum possible extent, independent from domestic jurisdictions. Hence, an electronic platform, as a closed environment, is built by a set of agreements between the operator and the users’ community. In absence of specific legal rules, obligations and rights of platform operators are laid down by the contract terms between the operator and every user, and, consequently, the role to be actually performed by operators is devised by the set of contracts supporting the platform.

Rodríguez-de-las-Heras, *supra* note 137, at 148–49.

and control the rights, powers, and duties of Providers and Users.¹³⁹ As a result, Platform Operators unilaterally create an internal legal environment in which parties engage.¹⁴⁰ In sum, the second element of the PUP model is the active role Platform Operators play: (1) in creating and operating the technological and legal environments, (2) creating and facilitating binding agreements with terms and conditions that are strongly skewed in their favor, and (3) providing ancillary services.

B. Types of PUP Models: The P-PUP Model

As noted above, the PUP model can be either for-profit—profit-driven PUP which we denominate “P-PUP”—or non-profit—which we denominate “N-PUP.”¹⁴¹ The operation of the P-PUP model depends on the profits of both the Platform Operator and the Provider. Conversely, the operation of the N-PUP model is not underpinned by profit.

The P-PUP model presupposes that the transactions between Providers and Users are contract-based. That is, transactions that

¹³⁹ See Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 254 (2015) (explaining that individuals rely on the Platform Operator “to advertise their products, connect them to potential customers, establish a contractual relationship, and facilitate payment.”); see also Stemler, *supra* note 2, at 39 (pointing out the importance of technology in regulating behavior through *lex informatica*. “*Lex informatica* is the concept involving the use of technological architectures to require or prohibit certain user interactions.”); see also Calo & Rosenblat, *supra* note 59, at 1652 (explaining that Platform Operators “design each participant’s entire digital experience from scratch. They build and update the apps or website portals that service providers and service users access. They structure the business model and acceptable forms of transaction. And they write the terms of service and privacy policies that every participant clicks through in order to use each service.”).

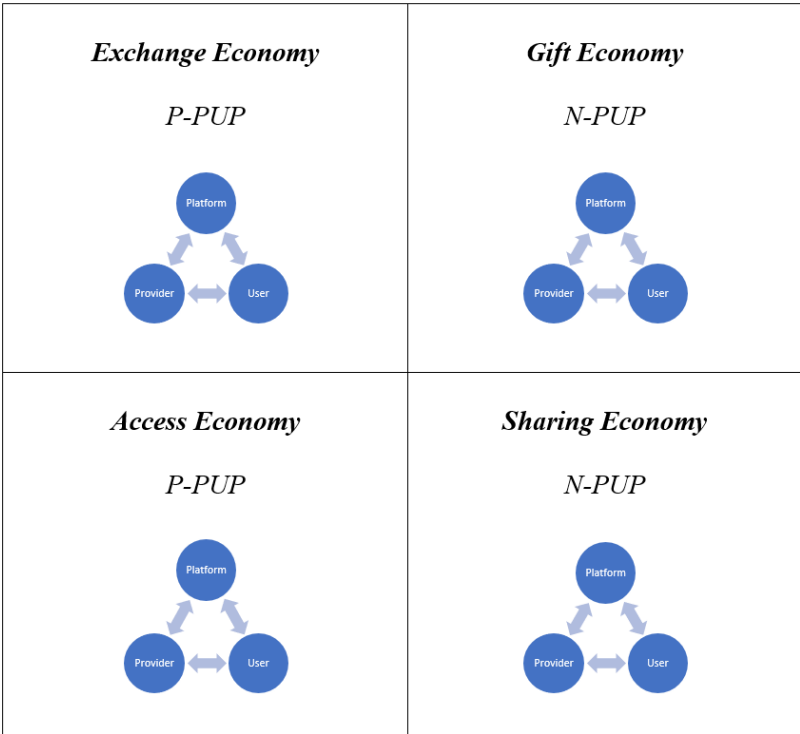
¹⁴⁰ Some authors have criticized the power Platform Operators have under this structure. See, e.g., Calo & Rosenblat, *supra* note 59, at 1650, 1653, 1661 (arguing Platform Operators create digital market manipulation, take advantage of their access to Providers and Users to influence stakeholders such as potential regulators, and hide information about the marketplace); Dyal-Chand, *supra* note 139, at 248, 292–93 (contending that big Platform Operators such as Uber, Airbnb, and TaskRabbit (1) “have a great deal of power vis-à-vis the service providers These power imbalances inhibit worker participation and contribute to rent-seeking by the platform providers”, and (2) “have been able to develop a new model for doing business that takes advantage of collaboration without accepting all the associated costs. One such cost is that these companies have to share more power and responsibility with the businesses involved in their networks.”).

¹⁴¹ See *supra* p. 1027.

form part of the P-PUP model are supported by consideration. The existence of the consideration requirement is, then, a *conditio sine qua non*¹⁴² of the P-PUP model.

Therefore, based on our *Economies Matrix*, the P-PUP model can only be located within the *Exchange* or *Access Economies*. The lack of consideration characterizing the transactions within the *Gift* and *Sharing Economies* excludes the P-PUP model in these *economies*. N-PUP models, thus, can only be located within the *Gift* and *Sharing Economies* (See Figure 3).

Figure 3



However, the P-PUP model needs to be distinguished further. This is because there are significantly different business models involved. This differentiation helps particularize subclasses of P-PUP

¹⁴² See *Conditio sine qua non*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *conditio sine qua non* or *sine qua non* as “[a]n indispensable condition or thing; something on which something else necessarily depends.”).

models that, ultimately, provide the defining characteristics of legal structures such as the ones utilized by Uber, Airbnb, and TaskRabbit—erroneously touted as “Sharing Economy” businesses. We are particularly interested in these types of businesses because they have caused some of the greatest disruptions in the legal environment. By identifying the specific legal characteristics of this subclass of P-PUP model, this Article aims to provide a more accurate legal and conceptual analysis facilitating appropriate regulation for these businesses, that to date has tended to be elusive and ambiguous in terms of its legal nature.

C. *The TMP-PUP Model*

The P-PUP model can be further subclassified based on time-limited partial transfers, time-limited service provisions, and the accepted forms of consideration. For purposes of this Article, the P-PUP models that are time-limited and that only accept monetary consideration are denominated “TMP-PUPs” (Time-limited, Monetary-consideration-based, Profit-driven PUP models). They are focused solely on time limited transactions—i.e., partial transfers of property rights, or time limited provision of services—and only accept consideration in monetary form. It is these businesses that have caused some of the greatest disruptions and are accordingly of greatest concern. The TMP-PUP model is the legal structure adopted by Platform Operators such as Uber, Airbnb, and TaskRabbit. It does not operate in the *Sharing Economy* nor in the *Gift Economy*. It exists only within the *Exchange* and *Access Economies*.

Therefore, the defining properties of the TMP-PUP model are the following:

First, the TMP-PUP model, like the PUP model, is a triangular legal structure composed of a Platform Operator, a Provider, and a User as its foundation.¹⁴³ We further refine the TMP-PUP model,

¹⁴³ See Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 111 (2018) (arguing that “[w]ork in the gig economy is also characterized by a triangular relationship. A company or platform links consumers seeking a product or service to a worker who can provide it.”); Marina Lao, *Workers in the Gig Economy: The Case for Extending the Antitrust Labor Exemption* 51 U.C. DAVIS L. REV. 1543, 1545 (2018) (arguing that in the Sharing Economy, workers “provide services in a triangular

noting that (1) Platform Operators are not providers of the goods and services that Users seek and consume;¹⁴⁴ (2) the triangular legal structure is comprised of three different legal relationships that may indicate rights of contract or transfer of property rights among the three parties;¹⁴⁵ and (3) the three legal actors—Platform Operators, Providers, and Users—can be composed of any type of person, natural or artificial.¹⁴⁶

relationship where an online platform serves as an intermediary linking the workers to potential customers.”); Rauch & Schleicher, *supra* note 1, at 917 (explaining that “sharing platforms create and serve ‘two-sided’ markets: their users include both market-buyers and market-sellers. Examples include Uber, which serves drivers *and* riders; Airbnb, which serves homeowners *and* renters; and DogVacay, which serves pet-owners *and* pet-sitters.”).

¹⁴⁴ See *supra* note 136. See also *Gannon v. Airbnb Inc.*, 295 So. 3d 779, 783–84 (Fla. Dist. Ct. App. 2020) (holding that Airbnb and other similar companies are simply conduits of the rental transaction and do not have any possessory interests in the properties rented through the platform); Katz, *supra* note 56, at 1071 (explaining that “unlike websites that act as online storefronts, sharing platforms are not direct service providers.”); Dyal-Chand, *supra* note 139, at 265 (identifying Providers as tiny businesses that act as suppliers).

¹⁴⁵ See *supra* p. 1028. See also *Ill. Transport. Trade Ass’n v. City of Chicago*, 839 F.3d 594, 598 (7th Cir. 2016) (explaining that one of the major differences between the model adopted by Uber and the model adopted by taxi companies is that Users ‘must sign up with Uber before being able to summon it, and the sign up creates a contractual relationship specifying such terms as fares, driver qualifications, insurance, and any special need of the potential customer owing to his or her having a disability.’); *Newark Cab Ass’n v. City of Newark*, 235 F. Supp. 3d 638, 646 (D.N.J. 2017) (explaining that in the TMP-PUP model, unlike the taxicab model, Platform Operators have a pre-existing contractual relationship with Users).

¹⁴⁶ Allowing legal entities to enter into the TMP-PUP model as Providers or Users is, ultimately, a business decision. For example, nowadays Uber has two different lines of business targeted to legal entities qua Users: Uber for Business and Uber Freight. See UBER, <https://www.uber.com/au/en/> [<https://perma.cc/WQC5-EGXG>]. Similarly, Parkhound allows the rental of parking spaces not only by residents but also by businesses. Under this TMP-PUP, thus, Providers can be both natural persons and legal entities. See *How It Works*, PARKHOUND, <https://www.parkhound.com.au/how-it-works> [<https://perma.cc/G44M-C7PV>]. See also *Terms*, AIRBNB, <https://www.airbnb.com.au/terms> [<https://perma.cc/YFS4-J8HM>] (establishing the following in section 17 of the Terms of Service: “You must register an account to access and use many features of the Airbnb Platform. Registration is only permitted for legal entities, partnerships and natural persons who are 18 years or older.”). Regarding Platform Operators, positive law and legal scholarship have recognized the possibility that these actors can be constituted by a natural person. See, e.g., *Road Transport (Public Passenger Services) Act 2001* (ACT) s 28 (Austl.) (providing that any ‘person’, including corporations and individuals, can act as a

Second, in the TMP-PUP model, the Platform Operator has an active role. Like the general PUP model,¹⁴⁷ in the TMP-PUP model Platform Operators facilitate the connection between Providers and Users through a platform,¹⁴⁸ aggregate information, and usually supply ancillary services such as payment collection, processing services, and customer support.¹⁴⁹ Additionally, Platform Operators

Platform Operator, called Transportation Booking Services in this Act). Further, according to Rodríguez-de-las-Heras:

Rarely, the operator is an individual (sole trader) or natural person. More usually, the operator adopts any of the organizational forms, available in the jurisdiction where it is located, to run a business (corporations, incorporate joint-ventures, private companies, but also associations, cooperatives, or partnerships). Interestingly, those organizational forms entailing a distinct and separate legal personality are preferred. Likewise, commercial companies and corporations are the most widespread option.’

Rodríguez-de-las-Heras, *supra* note 137, at 149.

¹⁴⁷ See *supra* p. 1029.

¹⁴⁸ See Dyal-Chand, *supra* note 139, at 248 (explaining that “[i]n the sharing economy, the key institutions that accomplish sharing are technological platforms that allow networks of individuals to connect with stable supplies of customers.”); Zale, *supra* note 1, at 537 (contending that technology “has made it possible for two people – typically strangers – to engage in sharing activities that had previously taken place primarily in close-knit communities.”); Katz, *supra* note 56, at 1070 (explaining that “most sharing platforms operate through either a web portal or a mobile application (‘app’).”).

¹⁴⁹ Platform Operators can be involved in other types of ancillary services such as user information verification, local tax collection and remittance, dispute resolution, pricing services, and purchasing of insurance coverage. *E.g.*, *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 para 51–50(d) (Austl.) (explaining that Mr. Kaseris, the applicant and Uber driver, was charged a service fee by Uber for services including lead-generation services, payment collection and processing services and support services); Robert L. Redfearn, *Sharing Economy Misclassification Employees and Independent Contractors in Transportation Network Companies* 31 BERKELEY TECH. L.J. 2013, 1027 (2016) (explaining that Uber controls a great part of the ride transaction by (1) vetting the persons that apply to be Uber drivers, (2) setting fare rates based on its own formulas, (3) taking a cut of the total fare paid to the driver, and (4) monitoring drivers data). In this regard, Rodríguez-de-las-Heras explains:

In managing the platform, the operator provides added-value services, adopts rules, monitors compliance, and penalizes infringements of internal rules by users. In sum, the operator acts as a service provider, a (contractual) regulator, and a (contractual) supervisor. Whereas the provision of services (payment management, insurance, inspection, rating, marketing) has a visible commercial impact, increasing the appeal of the offer in the market, fostering loyalty of users, and providing additional financial support; the tasks of regulating and supervising are key for the creation and preservation of trust.

unilaterally dictate the internal legal environment of the model.¹⁵⁰ They create a legal system which stipulates the rights and duties for the contractual parties up to and including procedures for dispute resolution and their ultimate determination.¹⁵¹ Consequently, Platform Operators create the internal legal environment in which the three legal relationships comprising the triangular legal structure are created, developed, and terminated.

Third, and specifically like the P-PUP model, the TMP-PUP model is a profit-driven model.¹⁵² The TMP-PUP model is designed for the profit of both the Platform Operator and the Provider.¹⁵³ Fourth, again as in the P-PUP model, in the TMP-PUP the goods and services are provided exclusively on a contract-basis.¹⁵⁴

Rodríguez-de-las-Heras, *supra* note 137, at 149. *See also* Dyal-Chand, *supra* note 139, at 258 (arguing that, "[o]n the supply side, one thing that makes these markets revolutionary is the outsourced sharing of key business functions by the individuals and tiny businesses involved in networks for peer-to-peer rentals, financing, and sales. . . .").

¹⁵⁰ *See supra* notes 138, 139 and accompanying text. *See also* Loewenstein, *supra* note 1, at 1010 (mentioning that "Uber, for instance, uses a sophisticated mobile app to connect drivers to fare-paying customers (or riders). The company leverages this technology by structuring its legal relationship with the drivers. . . ."); Katz, *supra* note 56, at 1071 (identifying the degree of control of the Platform Operator as a critical distinction between this actor and other online services. According to Katz, "[s]haring platforms exercise control over transactions by directing the form and content of listings, issuing minimum quality standards for providers, providing an electronic payment system, and charging a transaction fee for each exchange.").

¹⁵¹ *Id.*

¹⁵² *See* Stemler, *supra* note 24, 222 (arguing that "the Sharing Economy is motivated by profit, not altruism."); *see also* Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 178 (2016) (arguing that "the new sharing economy is largely driven by the for-profit motives of behemoth companies.").

¹⁵³ *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 1133, 1145 (N.D. Cal. 2015) (noting that "Uber derives profits from providing transportation services. . . ."); Calo & Rosenblat, *supra* note 59, at 1652 (arguing that this phenomenon has a simple business model: "It connects consumers to providers for a fee."); Zale, *supra* note 1, at 528, 565 n. 240 (explaining that individuals providing services through this phenomenon offer their labor and time in exchange for a fee, and identifying that "Airbnb, Uber, and Munchery, like many other sharing economy companies, are for-profit companies, not charitable institutions or community social clubs."); Stemler, *supra* note 24, at 207 (explaining that in this phenomenon "cash, as opposed to altruism, motivates supply-side user behavior.").

¹⁵⁴ *See* Caroline Meller-Hannich, *Share Economy and Consumer Protection*, in DIGITAL REVOLUTION: CHALLENGES FOR CONTRACT LAW IN PRACTICE 119, 125 (Reiner Schulze & Dirk Staudenmayer eds., 2016); Rodríguez-de-las-Heras, *supra* note 137, at 153 (observing

All transactions that are part of this model are supported by consideration.¹⁵⁵ These two latter characteristics, for profit and contract basis, confirm that the TMP-PUP model operates exclusively in the *Access* or the *Exchange Economies* and not in the *Gift* and the *Sharing Economies*.

However, what makes the TMP-PUP model unique is two additional elements. These elements are related to the temporality of the transaction and to the consideration required of Users. In terms of the first element, both goods and services are the assets that can be transacted through the TMP-PUP model.¹⁵⁶ These transactions, however, are time-limited. Providers agree to provide services to Users on an ad hoc or casual basis rather than a long-term basis.¹⁵⁷ For example, Uber drivers (Providers) supply the transportation service to the Uber passengers (Users) in a casual basis. Alternatively, when the platform is used for the provision of goods under the TMP-

that “electronic platforms are contract-based buildings. Such a contractual infrastructure designs the liability regime and indeed allocates duties and liabilities between operators and platform’s members. . . .”).

¹⁵⁵ See Erez Aloni, *Pluralizing the Sharing Economy*, 91 WASH. L. REV. 1397, 1407 (2016) (arguing that, in this phenomenon, “[c]onsumers pay for the services and goods, and providers enjoy an additional, or main, source of income. All types of transactions are monetized. In contractual terms, we can say that all these exchanges are supported by consideration. . . .”); Lobel, *supra* note 1, at 109 (arguing that “the platform tilts the balance away from altruistic/communal interactions to marketable/commodified exchanges.”); Infranca, *supra* note 133, at 30 (arguing that “[g]ratuitous sharing, or even bartering for that matter, does not mark the exchange of goods and services between buyers and sellers matched through . . . platforms.”).

¹⁵⁶ See Zale, *supra* note 1, at 528 (arguing that the economic driver of the “Sharing Economy” is the monetization of two types of assets: goods or services); McPeak, *supra* note 152, at 178 (describing the “Sharing Economy” as a “group of new, innovative businesses that offer peer-to-peer goods and services through new technology.”); Rauch & Schleicher, *supra* note 1, at 915 (explaining that the peer-to-peer sharing network “can include either assets or services or both.”); John O. McGinnis, *The Sharing Economy as an Equalizing Economy*, 94 NOTRE DAME L. REV. 329, 334 (2018) (observing that “[t]he essence of the sharing economy is that it uses online agency to create markets in property and jobs that were not nearly as effective previously.”).

¹⁵⁷ See Zale, *supra* note 1, at 528 (explaining that one of the assets that are monetized through this model are services, which “are provided on an ad hoc basis by individuals offering their labor and time in exchange for a fee.”); Rauch & Schleicher, *supra* note 1, at 915 (observing that, within this model, one-off Users hire Providers looking for quick gigs); Scott & Brown, *supra* note 10, at 587–88 (explaining that the services provided through this phenomenon are on-demand and short-term services).

PUP model, the transfer is a partial transfer of property rights.¹⁵⁸ For example, Airbnb hosts (Providers) transfer the right to possess or the right to use the property to the Airbnb guests (Users) instead of the entire bundle of rights (ownership). Note that while the long-term provision of services or total transfer of the bundle of property rights are within the technological and business capabilities of the P-PUP model, they are not part of the TMP-PUP model because they create a different legal liability and offer a different business model.

Regarding the second element unique to the TMP-PUP model, the element of consideration, Users are required to pay money rather than barter or provide any other form of consideration for the goods or services supplied by Providers.¹⁵⁹ Thus, the permanent or long-term provision of services as well as the selling, bartering, exchanging, and gifting of goods are excluded from the TMP-PUP model.¹⁶⁰

¹⁵⁸ See Kochan, *supra* note 101, at 945 (explaining that one of the critical features of the phenomenon is the "exchange of interests in property and a conferral of rights to use or benefit from real or personal property."); Kreiczer-Levy, *Consumption*, *supra* note 65, at 92 (arguing that this phenomenon refers to "consumers who choose not to purchase property, but rather to bargain for short-term use."); Zale, *supra* note 1, at 562 (arguing that "exclusivity of use or possession is necessarily embedded into property-sharing activities."). "Sharing Economy" literature usually refers to this factor as the existence of access instead of ownership. See, e.g., GANSKY, *supra* note 1, at 5 (asserting that this phenomenon "is based on network-enabled sharing—on access rather than ownership."); BOTSMAN & ROGERS, *supra* note 1, at xv (asserting that this phenomenon "is enabling people to realize the enormous benefits of access to products and services over ownership. . . ."); Lobel, *supra* note 1, at 110 (including "access over ownership" as one of the ten fundamental principles of the model); Kochan, *supra* note 101, at 939 (contrasting access and ownership in order to understand the phenomenon); Zale, *supra* note 1, at 533 (emphasizing that one of the characteristics of the model is the access to, rather than the ownership of, property).

¹⁵⁹ See Zale, *supra* note 1, at 561 (recognizing that "the monetization of assets is one of the defining features of the sharing economy. . . ."); Oei & Ring, *supra* note 1, at 990 (contending that in this phenomenon, Platform Operators "enable consumers to summon rides, rent accommodations, or hire services from peers via personal computer or a mobile app, in exchange for payment."); Lobel, *supra* note 1, at 109 (arguing that this phenomenon "is growing exponentially, but it is not free. . . . The platform takes the saying that everything, and *everyone*, has a price quite literally.").

¹⁶⁰ This characteristic entails that platforms mediating the transfer of the bundled ownership are not part of the TMP-PUP model, such as: (1) Amazon, eBay, and Craigslist (where goods are sold, part of the *Exchange Economy*); (2) BarterDaddy, Swapub, and TradeMade (where barter takes place, part of the *Exchange Economy*); (3) Simbi, Listia, and Bunz (where goods are transferred for a digital unit of currency, part of the *Exchange*

In sum, the TMP-PUP model is a for-profit, triangular legal structure where two parties (Providers and Users) enter into binding contracts for the provision of goods (partial transfer of the property-bundle of rights) or services (ad hoc or casual services) in exchange for monetary payment through an online platform operated by a third party (Platform Operator) with an active role in the definition and development of the legal conditions upon which the goods and services are provided.

It is important to note, and perhaps of ultimate importance, that the PUP model and all its derivative sub-categories often operate in regulated environments, from the provision of accommodation services to public transport services. One of the major impacts of the PUP model, and particularly TMP-PUP's models, has been the ability of Platform Operators to avoid public regulation of the activities applicable to other traditional providers. The PUP model has allowed activities to be shifted between regulatory regimes or categories. For example, the PUP model allows Platform Operators to be categorized as mere technology companies rather than employers, and Providers to be categorized as private contractors rather than employees. It allows risk shifting from enterprises to individual Providers.

Any legal analysis of the PUP model not only needs to take account of the internal legal environment created by the Platform Operator, but also the external regulatory environment enabling not only the Platform Operator but the activities which it facilitates, including the underlying contractual relations among itself, the Provider, and the User. We argue that it is this dual legal environment in which the Platform Operator dictates the terms and conditions for the participants and may shift the location of activities in terms of the external legal environment's categories which constitutes a new legal structure—the legal PUP model. Thus, it is necessary when conceptualizing the PUP model to take account not only of PUP as a technology or PUP as a business model, but PUP as creating an entirely new legal structure.

Economy); and (4) Zilch, LeftoverSwap, and FreeCycle (where donations take place, part of the *Gift Economy*).

The distinctions developed in this Article are critical because prior scholarship has conflated the categories of *economies* while also conflating the *Sharing Economy* with the PUP model generally and the TMP-PUP model specifically. Furthermore, the judiciary has struggled to categorize the various phenomena under consideration with the result that apparently incoherent decision-making and unpredictability have crept into the legal environment. The lack of appropriate categories and definitions has destabilized the law surrounding the PUP model businesses.

CONCLUSION

The analysis of the different *economies*, including the *Sharing Economy*, and the theoretical development of the PUP model—and its subclasses the P-PUP and the TMP-PUP models—resolves a wide range of issues that have arisen because of new internet-based platforms. The development of the PUP model and its subclasses addresses a major gap in our understanding of this technological development and its interaction with the legal system. We have argued that a legally informed understanding of the *Sharing Economy*—particularly, distinguishing it from the *Exchange*, *Gift*, and *Access Economies*—is critical to an analysis of the phenomenon. Identifying and delineating these economies allows us to deal with the new behaviors and practices facilitated by the technologies underpinning the PUP model.

We have argued that the PUP model has two defining elements: (1) a triangular legal structure of actors and legal relationships and (2) an active Platform Operator. We have further argued that the P-PUP model has two additional elements: (1) a for-profit nature and (2) a contractual foundation for transactions. Finally, we have argued that the TMP-PUP model has two additional elements: (1) monetary consideration from Users and (2) temporality in terms of the provision of services or access to property.

Our analysis then differentiates the TMP-PUP model, which is the model that embraces those highly disruptive businesses such as Uber, Airbnb, and TaskRabbit from all other types of platform-

based transactions.¹⁶¹ Thus, the TMP-PUP model excludes (1) bilateral transactions where Platform Operators directly provide the goods or services;¹⁶² (2) transactions for the provision of permanent or long-term services;¹⁶³ (3) transactions transferring the bundle of rights *in totum*;¹⁶⁴ (4) transactions lacking considerations;¹⁶⁵ (5) transactions where the delivery of money is not an obligation of Users;¹⁶⁶ (6) transactions without a profit;¹⁶⁷ (7) transactions where Platforms Operators are passive actors of the structure;¹⁶⁸ and (8)

¹⁶¹ Other examples of firms falling within this legal structure are: DogVacay (dog walking services), PetCloud (pet sitting services), Eatwith (social dining services), Luxe (valet parking services), KitSplit (renting of cameras), LiquidSpace (renting of offices), ParkingPanda (renting of parking lots), and Capitalbikeshare (renting of bikes).

¹⁶² Therefore, firms like Zipcar (from Avis Budget Group), Car2Go (from Daimler Group), and DriveNow (from BMW Group) are excluded from this legal structure because they own the car fleet rented to the public. In other words, these firms are direct providers of the goods to be rented. This situation is different from what happens with companies such as Getaround, Turo, or Drivy, where the triangular legal structure remains. Here, the cars rented through the platform are the ones Providers own.

¹⁶³ Therefore, firms like Seek, MeetFrank, and Workable—where matching between employers and job seekers is facilitated through a platform—are excluded from the TMP-PUP model.

¹⁶⁴ Therefore, firms like (1) Amazon, eBay, and Craigslist (where goods are sold); (2) BarterDaddy, Swapub, and TradeMade (where goods are bartered); (3) Ziiilch, LeftoverSwap, and FreeCycle (where goods are given away); and (4) Simbi, Listia, and Bunz (where goods are transferred for digital units of currency), are excluded from the TMP-PUP model.

¹⁶⁵ Therefore, firms like (1) Ziiilch, LeftoverSwap, and FreeCycle (where the bundle of rights is totally transferred without consideration); (2) CouchSurfing, TrustRoots, and BeWelcome (where the bundle of rights over choses in possession is partially transferred without consideration); and (3) VolunteerMatch, KiwanisInternational, and GoVolunteer (where services are provided without consideration), are excluded from the TMP-PUP model.

¹⁶⁶ Therefore, firms like (1) BarterDaddy, Swapub, and TradeMade (where the consideration is constituted by the exchange of goods); (2) SwapRight, Swapaskill, and SkillsBarter (where the consideration is constituted by the exchange of services); and (3) Simbi, Listia, and Bunz (where digital units of currency are used rather than money), are excluded from the TMP-PUP model.

¹⁶⁷ Therefore, firms like CouchSurfing, TrustRoots, and BeWelcome (where neither Platform Operators nor Providers have a profit interest) are excluded from the TMP-PUP model.

¹⁶⁸ Following the explanations of the elements of the PUP model, a passive Platform Operator would be a firm that, despite providing an online platform for the connection of Providers and Users, does not shape all the legal relationships comprising the triangular model, such as passive message boards (e.g., craigslist, Twitter, and Instagram). See Katz,

transactions within the *Gift Economy* and, ironically, the *Sharing Economy*.¹⁶⁹

Using the frameworks we have provided, it is possible to differentiate and organize a myriad of PUP models and transactions that have been erroneously categorized as part of the "Sharing Economy." This step is crucial in addressing various ambiguities and is a step towards the proper regulation of these businesses. We have analyzed the PUP model in terms of *economies* and terms of property and contract to provide a foundation for the further subcategories. In the analysis of the subclasses P-PUP and TMP-PUP models, new legal categories arise. We believe that the PUP and its subclasses should be considered as new models which, while facilitating transfers and transactions through technological innovation, critically create a new legal structure. This new structure constitutes a legal environment in which the Platform Operator sets the rules—often including rules of adjudication—and controls enforcement. Within the PUP, the TMP-PUP model arises as a specific new legal category with the potential to classify highly disruptive business models such as Uber, Airbnb, and TaskRabbit, providing a legal, conceptual delimitation for the analysis, understanding, and regulation of these models.

supra note 56, at 1072 (explaining the characteristics of passive message boards and its differences from a direct service provider).

¹⁶⁹ Therefore, firms like Ziiilch, LeftoverSwap, and FreeCycle (part of the *Gift Economy*) and CouchSurfing, TrustRoots, and BeWelcome (part of the *Sharing Economy*) are excluded from the TMP-PUP model.